

\$26 Million in CLASS-WIDE ARBITRATION AWARDS Affirmed*

The South Carolina Supreme Court, in *Bazzle v. Green Tree Financial Corp.*, 569 S.E.2d 349 (S.C. 2002), ruled class-wide arbitration is permissible, even where the arbitration agreement is silent as to the availability of class-wide relief.¹ *Bazzle v. Green Tree* consolidates Green Tree's appeals of two different class-wide arbitration awards, one in *Bazzle*, \$10.9 million to the class and \$3.6 million in attorney fees, and the other in *Lackey*,² \$9.2 million to the class and \$3 million in attorney fees.

FAA DOES NOT LIMIT AVAILABILITY OF CLASS-WIDE ARBITRATION

A number of federal courts found silence in an arbitration agreement as to the availability of class-wide arbitration prevents a court from ordering such arbitration.³ The argument is the Federal Arbitration Act (FAA) § 4 allows a party to seek a federal court order "directing the parties to proceed to arbitration in accordance with the terms of the agreement."⁴ Consolidating two different cases (with different parties) is not a proceeding in accordance with the terms of the agreement. Because a class action is similar to a consolidation, ordering such a proceeding would also not be in accordance with the terms of the arbitration agreement.

Bazzle identifies a number of ways this argument breaks down, particularly for a state court action. First, a consolidated arbitration may be consistent with an arbitration agreement.⁵ Second, there are important policy reasons to allow class-wide arbitration not present for consolidated arbitrations.⁶ Third, South Carolina and certain other states permit consolidation of arbitrations, indicating class arbitrations should also be allowed. Fourth, FAA § 4 only applies to federal court control when consumers seek class certification from state court.

Bazzle also provides that two different legal presumptions permit class-wide arbitrations. Ambiguous clauses are interpreted against the drafter and the general presumption in favor of enforcement of an arbitration agreement means class claims should be submitted to class arbitration.⁷

California, Pennsylvania and South Carolina Allow Class-Wide Arbitration

Bazzle joins California and Pennsylvania courts in allowing class-wide arbitrations to go forward.⁸ On the other hand, Alabama and Washington State courts follow federal precedents, disallowing class-wide arbitration where an arbitration clause is silent as to its availability.⁹

Methods to Certify Classes in Arbitration Proceedings

Bazzle v. Green Tree demonstrates two ways to initiate class-wide arbitration. In *Bazzle* (before its consolidation with *Lackey*), the trial court certified the class and ordered the action to proceed to arbitration. Green Tree disagreed and *Bazzle* had to obtain a court order enforcing the arbitration agreement and seek appointment of an arbitrator to

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hear the matter on a class-wide basis. Consumers benefited from the court's order by the fact the court picked the arbitrator instead of the parties agreeing on an arbitrator from a list provided by AAA or some other arbitration service provider.

In *Lackey*, the court did not rule on the class certification request. Instead, the court ordered the case before an arbitrator who decided to proceed on a class-wide basis. Even so, consumers are usually better served to obtain an order from the court. Arbitrators are less likely to proceed on their own on a class-wide basis and the defendant is likely to raise due process issues where an arbitrator, picked by two private parties,



decides other consumers will be bound by the arbitrator's decision. This due process concern will likely be raised even where a notice is sent to the class providing them with the opportunity to opt out.

Where Arbitration Clause Explicitly Refers to Class Relief or Where Silence Treated as Preventing Class Arbitration

Bazze, and most cases, examine availability of class-wide arbitrations where the arbitration clause is silent on the issue. If the arbitration clause authorized class-wide arbitration, the court can order such arbitration because it requires the parties to proceed in accordance with the terms of the agreement.¹⁰

What if an arbitration clause explicitly prohibits class-wide arbitrations? A growing number of cases hold such a provision to be an important factor in finding the arbitration clause unconscionable.¹¹ Moreover, as the Supreme Court has made clear, an arbitration clause is not enforceable if it deprives an individual of federal statutory rights. Even though the Court has found the right to bring a class action is not a substantive right under the Truth in Lending Act, courts can reach a different conclusion when interpreting other statutes.

If a court finds silence as to the availability of class arbitration as prohibiting such relief, the court should treat the silence the same as a clause that specifically prohibits class actions in arbitration, and find it unconscionable.

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1. The court interpreted language that required arbitration of disputes relating to "this contract" as being silent as to the availability of class-wide arbitration.

2. *Lackey v. Green Tree Fin. Corp.*, 498 S.E.2d 898 (S.C. Ct. App. 1998).

3. See *Champ v. Siegel Trading Co.*, 55 F.3d 269 (7th Cir. 1995); NCLC's Consumer Arbitration Agreements § 9.4.2 (2d ed. 2002).

4. 9 U.S.C. § 4 (2002).

5. Even the Seventh Circuit that issued the *Champ* decision *supra* note 2, permits consolidation where the arbitration clause is silent on its availability.

Conn. Gen. Life Ins. Co. v. Sun Life Assurance Co. of Can., 210 F.3d 771 (7th Cir. 2000) (Posner, C.J.).

6. See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000).

7. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995) (allowing punitive damages award allowed where contract silent on the issue).

8. *Keating v. Superior Court*, 645 P.2d 1192 (Cal. 1982), *rev'd on other grounds sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984); *Blue Cross of Cal. v. Superior Court*, 78 Cal. Rptr. 2d 779 (Cal. Ct. App. 1999); *Izzi v. Mesquite Country Club*, 231 Cal. Rptr. 315 (Cal. Ct. App. 1986); *Gainey v. Occidental Land Research*, 231 Cal. Rptr. 249 (Cal. Ct. App. 1986); *Lewis v. Prudential-Bache Sec., Inc.*, 225 Cal Rptr. 69 (Cal. Ct. App. 1986); *Dickler v. Shearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. Ct. 1991). See also *Brennan v. ACE INA Holdings, Inc.*, No. 00-2730, 2002 U.S. Dist. LEXIS 15039 (E.D. Pa. Aug. 1, 2002).

9. *Med Ctr. Cars, Inc. v. Smith*, 727 So. 2d 9 (Ala. 1998); *Stein v. Geonerco, Inc.*, 17 P.3d 1266 (Wash. Ct. App. 2001).

10. Federal Arbitration Act § 4, 29 U.S.C. § 4 (2002).

11. *ACORN v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160 (N.D. Cal. 2002); *Ting v. AT&T*, 182 F. Supp. 2d 902 (N.D. Cal. 2002); *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862 (Cal. Ct. App. 2002); *Bellsouth Mobility LLC v. Christopher*, 819 So. 2d 171 (Fla. Dist. Ct. App. 2002).